

BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

<i>In the Matter of</i>	)	
	)	CG Docket No. 02-278
Petition of Medversant Technologies, LLC	)	CG Docket No. 05-338
For Retroactive Waiver of	)	
47 C.F.R. § 64.1200(a)(4)(iv)	)	

**COMMENT OF AFFILIATED HEALTH CARE ASSOCIATES, P.C.  
TO PETITION OF MEDVERSANT TECHNOLOGIES, LLC**

The petition for retroactive waiver filed by Medversant Technologies, LLC is abusive and should be denied.

Medversant Technologies, LLC (“Medversant”) claims that plaintiff, Affiliated Health Care Associates, P.C. (“Plaintiff”) and/or members of the putative class consented to receiving its facsimiles. (Petition, p. 3) Plaintiff’s complaint alleges that Medversant sent it unsolicited fax advertisements on August 13, 2014 and August 20, 2014. In addition, Plaintiff alleges that the faxes do not contain an opt out notice in the form required by 47 U.S.C. § 227. Medversant answered plaintiff Affiliated Health Care Associates, P.C.’s complaint asserting numerous affirmative defenses of consent and EBR, and derivatives of those defenses, with plaintiff and the putative class members. (Appendix A) Medversant admits that “it transmitted informational facsimile communications to healthcare providers on August 13, 2014 and August 20, 2014 on behalf of Healthways.” (Appendix A, ¶ 18)

In its petition, Medverant argues that “As part of its core credentialing business, Medversant communicates and exchanges valuable information directly with healthcare providers, including by facsimile. Medversant did not believe that these solicited facsimiles

required opt-out notices.” (Petition, p. 2)

Medversant fails to supply any basis for its assertions that the faxes it sent were “solicited” or that it obtained “prior express permission” from anyone, including plaintiff. The Declaration of Medversant’s Chief Executive Officer and an attorney, Matthew Haddad adds nothing to the Petition and is bereft of any facts or details to support the assertion that Medversant’s faxes were sent with prior express invitation or permission. The description of the faxes in the Petition indicates they were sent pursuant to an established business relationship, not at the express request of the recipient. (Petition, p. 2)

However, the waiver contemplated by the FCC does not extend to faxes sent in the context of an established business relationship. Rather, because the Commission’s notice of intent to adopt Section 64.1200(a)(4)(iv) “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent *with prior express invitation or permission of the recipient*,” such retroactive waivers should only be considered in those instances involving prior express invitation or permission where there is some evidence that the petitioner misunderstood and, as the FCC provided, **not** in instances involving established business relationships or “customers.”

The Commission has repeatedly held that the business claiming consent or an established business relationship has the burden of proof. “[A] sender should have the obligation to demonstrate that it complied with the rules, including that it had the recipient’s prior express invitation or permission.” *In re: Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278; CG Docket No. 05-338, FCC Release 06-42, 21 FCC Rcd 3787, at 3812, 2006 FCC LEXIS 1713; 38 Comm. Reg. (P & F) 167 (April 6, 2006).

The FCC has consistently adhered to this position. *Virtual Auto Loans*, EB-09-TC-230, 2009 FCC LEXIS 4342 (March 9, 2009); *New York Security and Private Patrol, Inc.*, EB-09-TC-231, 2009 FCC LEXIS 4343 (March 9, 2009).

Courts have also followed this rule and placed the burden of proof on the sender of the communication. *Gutierrez v. Barclays Group*, 10cv1012 DMS (BGS), 2011 U.S. Dist. LEXIS 12546, 2011 WL 579238, at \*2 (S.D. Cal. Feb. 9, 2011); *Van Sweden Jewelers, Inc. v. 101 VT, Inc.*, 1:10-cv-253, 2012 WL 4074620, 2012 U.S. Dist. LEXIS 85663 (W.D.Mich., June 21, 2012); *Green v. Service Master on Location Servs. Corp.*, 07 C 4705, 2009 WL 1810769, 2009 U.S. Dist. LEXIS 53297 (N.D. Ill. June 22, 2009); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 WL 2224892, \* 3-4, 2008 U.S. Dist. LEXIS 41766 (N.D. Ill. May 27, 2008) (observing that issue of consent is an affirmative defense); *Hinman v. M & M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152 (N.D. Ill. 2009) (finding that consent did not exist with respect to the class because the TCPA allocates the burden of obtaining consent on the senders of unsolicited faxes, rather than requiring recipients to "opt-out"); *Lampkin v. GGH, Inc.*, 2006 OK CIV APP 131, 146 P.3d 847, ¶27 (Okla. Ct. App. 2006) (recipient should not be charged with proving the negative propositions that it did not give permission or did not have a business relationship with sender). This is consistent with the general rule that the party claiming the benefit of an exception in a federal statute, and the party who logically would have evidence of consent or an established business relationship, has the burden of coming forward with at least some evidence of the applicability of these exceptions. *E.E.O.C. v. Chicago Club*, 86 F.3d 1423, 1429-30 (7th Cir. 1996); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 128 S. Ct. 2395, 2400, 171 L. Ed. 2d 283 (2008) ("[T]he burden of proving

justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits."); *Irwin v. Mascott*, 96 F. Supp. 2d 968 (N.D. Cal. 1999).

Here, Medversant offers absolutely nothing to substantiate that anyone consented to receiving faxes from it.

Affiliated Health Care Associates, P.C. denies giving consent to the sender of the faxes. (Affidavit of Irene Slusarenko, Appendix B). The faxes seek to establish a relationship with the recipient by selling the product and/or service, ProMailSource, a secure email service and system, to healthcare providers. At least one of the faxes attached to plaintiff's complaint is not specifically addressed to any person, which would normally be the case if consent to send it had been obtained. In short, the faxes have every indication of a "blast fax" sent without consent or an established business relationship.

In addition, Medversant does not state why it "believed" its faxes did not require an opt out notice. There is nothing in the Petition to indicate that Medversant read or relied on the Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005), or Junk Fax Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006), prior to sending its junk faxes. There is also no evidence that Medversant, its CEO who is an attorney or anyone else that sent the faxes misunderstood anything about their obligation to include an opt-out notice. There is no opt out notice of any kind on the junk faxes attached to plaintiff's complaint. "We emphasize, however, that simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver." (FCC 14-164, at ¶ 26)

The Junk Fax Order requires that fax advertisements sent to recipients that provided prior express invitation or permission must include an opt out notice. 47 C.F.R. § 64.1200(a)(4)(iv); *see* Junk Fax Order, 21 FCC Rcd at 3812, para. 48; *See* Petition, p. 2. Petitioners may apply for a retroactive waiver “of the Commission’s rules requiring an opt-out notice on fax ads sent with the prior express permission of the recipient....” *Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipients’s prior Express Permission*, CG Docket No. 02-278, 05-338, Order, FCC 14-164, ¶ 22 (Oct. 30, 2014) (emphasis added). Importantly, Medversant does not contend in its petition that its facsimiles were advertisements. Medversant’s answer states that the faxes were “informational facsimile communications”. (Appendix A, ¶¶ 1, 8, 13, 14, 17-19, 24, 28, 30, 37, 45, 47, 53, 54, 55, 59, 61, 67, 72, 74, 81, 85, 87) Medversant does not contend it sent or caused to send any advertisements.

Finally, Medversant does not give any indication of its financial resources or its potential liability in plaintiff’s case. Instead, Medversant only states that Plaintiff seeks “substantial statutory damages.” (Petition, p. 4) In its answer, Medversant admitted that it transmitted faxes to more than “40 healthcare providers with area codes in Illinois” but denied that numerosity was satisfied. (Appendix A, ¶¶ )19, 29, 46, 60, 73, 86) On this record, Medversant may be liable for a maximum of \$60,000 (40 faxes x \$1,500 per fax). Medversant is not a publicly traded limited liability corporation but on its website, it claims to be the “leader in technology solutions for one of the most critical components of healthcare administration, the management of healthcare provider information.” [www.medversant.com/aboutus](http://www.medversant.com/aboutus) Plaintiff submits that it is unlikely that \$60,000 is a drain on its resources.

On this record, no action by the Commission is warranted. There are no special circumstances to warrant a deviation from the general rule and a waiver would not serve the public interest. Medversant's petition should be stricken and/or denied. The petition is nothing more than a baseless attempt to complicate an enforcement action by the recipient of unsolicited advertising faxes.

Respectfully submitted,

s/ Daniel A. Edelman  
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# **APPENDIX A**

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

AFFILIATED HEALTH CARE	)	
ASSOCIATES, P.C., on behalf of plaintiff and	)	
the class members defined herein,	)	
	)	
Plaintiff,	)	Case No. 14-cv-10247
	)	
v.	)	Judge Virginia M. Kendall
	)	
MEDVERSANT TECHNOLOGIES, LLC, and	)	Magistrate Judge Maria Valdez
HEALTHWAYS WHOLEHEALTH	)	
NETWORKS, INC., and JOHN DOES 1-10,	)	
	)	
Defendants.	)	

**ANSWER AND AFFIRMATIVE AND OTHER DEFENSES**

Defendant Medversant Technologies, LLC (“Medversant”) answers the Complaint of Plaintiff Affiliated Health Care Associates, P.C. on behalf of itself and the class members defined in the Complaint (“Plaintiff”) as follows:

1. Plaintiff Affiliated Health Care Associates, PC, brings this action to secure redress for the actions of defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., in sending or causing the sending of unsolicited advertisements to telephone facsimile machines in violation of the Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA"), the Illinois Consumer Fraud Act, 815 ILCS 50512 ("ICFA"), and the common law.

**ANSWER:** Paragraph 1 contains legal conclusions to which no response is required. To the extent paragraph 1 is intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to various healthcare providers on behalf of defendant Healthways Wholehealth Networks, Inc. (“Healthways”). Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 1.

2. The TCPA expressly prohibits unsolicited fax advertising. Unsolicited fax advertising damages the recipients. The recipient is deprived of its paper and ink or toner and the use of its fax machine. The recipient also wastes valuable time it would have spent on something else. Unsolicited faxes prevent fax machines from



receiving and sending authorized faxes, cause wear and tear on fax machines, and require labor to attempt to identify the source and purpose of the unsolicited faxes.

**ANSWER:** Paragraph 2 contains legal conclusions to which no response is required. To the extent paragraph 2 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 2.

### **PARTIES**

3. Plaintiff Affiliated Health Care Associates, PC, is a professional corporation with offices at 2229 W. Chicago Avenue, Chicago, Illinois 60622, where it maintains telephone facsimile equipment.

**ANSWER:** Medversant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 3 and therefore denies each and every allegation contained in paragraph 3.

4. Defendant Medversant Technologies, LLC, is a California limited liability company. Its registered agent and office is Matthew Haddad, 355 S. Grand Avenue, Suite 1700, Los Angeles, California 90071.

**ANSWER:** Medversant admits that it is a limited liability company organized and existing under the laws of the State of California, and that its registered agent is Matthew Haddad, with an office located at 355 S. Grand Avenue, Suite 1700, Los Angeles, California 90071. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 4.

5. Defendant Healthways WholeHealth Networks, Inc., is Delaware corporation with its principal place of business at 701 Cool Springs Blvd., Franklin, Tennessee 37067. Its registered agent and office is National Registered Agents Inc., 4701 Cox Road, Suite 285, Glen Allen, Virginia 23060.

**ANSWER:** Medversant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 5 and therefore denies each and every allegation contained in paragraph 5.

6. Defendants John Does 1-10 are other natural or artificial persons that were involved in the sending of the facsimile advertisements described below. Plaintiff does not know who they are.

**ANSWER:** Medversant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 6 and therefore denies each and every allegation contained in paragraph 6.

#### **JURISDICTION AND VENUE**

7. This Court has jurisdiction under 28 U.S.C. §§1331 and 1367. *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 751-53 (2012); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7<sup>th</sup> Cir. 2005).

**ANSWER:** Paragraph 7 contains legal conclusions to which no response is required. To the extent paragraph 7 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 7.

8. Personal jurisdiction exists under 735 ILCS 5/2-209, in that defendants:
- a. Have committed tortious acts in Illinois by causing the transmission of unlawful communications into the state.
  - b. Have transacted business in Illinois.

**ANSWER:** Paragraph 8 and its subparts contain legal conclusions to which no response is required. To the extent paragraph 8 and its subparts are intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 8 and its subparts.

9. Venue in this District is proper for the same reason.

**ANSWER:** Paragraph 9 contains legal conclusions to which no response is required. To the extent paragraph 9 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 9.

10. On August 13, 2014, plaintiff Affiliated Health Care Associates, PC, received the unsolicited fax advertisement attached as Exhibit A on its facsimile machine.

**ANSWER:** Medversant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 10, and therefore denies such allegations.

11. On August 20, 2014, plaintiff Affiliated Health Care Associates, PC, received the unsolicited fax advertisement attached as Exhibit B on its facsimile machine.

**ANSWER:** Medversant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 11, and therefore denies such allegations.

12. Discovery may reveal the transmission of additional faxes as well.

**ANSWER:** Medversant admits the allegations contained in paragraph 12.

13. Defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., are responsible for sending or causing the sending of the faxes.

**ANSWER:** Paragraph 13 contains legal conclusions to which no response is required. To the extent paragraph 13 is intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications on behalf of Healthways on August 13, 2014 and August 20, 2014. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 13.

14. Defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., as the entities whose products or services were advertised in the faxes, derived economic benefit from the sending of the faxes.

**ANSWER:** Medversant admits that the informational facsimile communications that it transmitted to on behalf of Healthways contained information regarding Medversant's ProMailSource service. Medversant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegation that Healthways derived economic benefit from the transmission of such informational facsimile communications and therefore denies such

allegation. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 14.

15. Defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., either negligently or wilfully violated the rights of plaintiff and other recipients in sending the faxes.

**ANSWER:** Medversant denies the allegations contained in paragraph 15.

16. Plaintiff had no prior relationship with defendants and had not authorized the sending of fax advertisements to plaintiff.

**ANSWER:** Medversant denies the allegations contained in paragraph 16.

17. The faxes do not contain an "opt out" notice in the form required by 47 U.S.C. § 227.

**ANSWER:** Medversant admits that the informational facsimile communications that it transmitted on behalf of Healthways do not contain an "opt out" notice. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 17.

18. On information and belief, the faxes attached hereto were sent as part of a mass broadcasting of faxes.

**ANSWER:** Medversant admits that it transmitted informational facsimile communications to healthcare providers on August 13, 2014 and on August 20, 2014, on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 18.

19. On information and belief, defendants have transmitted similar unsolicited fax advertisements to at least 40 other persons in Illinois.

**ANSWER:** Medversant admits that it transmitted informational facsimile communications to more than 40 healthcare providers with area codes associated with Illinois on August 13, 2014 and on August 20, 2014, on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 19.

20. There is no reasonable means for plaintiff or other recipients of defendants [sic] unsolicited advertising faxes to avoid receiving illegal faxes. Fax machines must be left on and ready to receive the urgent communications authorized by their owners.

**ANSWER:** Medversant is without knowledge or information sufficient to form a belief as to the truth or falsity of Plaintiff's stated need to leave machines on and ready to receive urgent communications, and therefore denies such allegation. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 20.

**COUNT I - TCPA**

21. Plaintiff incorporates ¶¶ 1-20.

**ANSWER:** Medversant restates and incorporates its answers to paragraphs 1 through 20 herein.

22. The TCPA makes unlawful the "use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine 47 U.S.C. §227(b)(1)(C).

**ANSWER:** Paragraph 22 contains legal conclusions to which no response is required. To the extent paragraph 22 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 22.

23. The TCPA, 47 U.S.C. §227(b)(3), provides:

Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State –

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the Court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the subparagraph (B) of this paragraph.

**ANSWER:** Paragraph 23 contains legal conclusions to which no response is required. To the extent paragraph 23 is intended to include any allegations of fact, Medversant states that the statute speaks for itself. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 23.

24. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes, in the form of paper and ink or toner consumed as a result. Furthermore, plaintiff's statutory right of privacy was invaded.

**ANSWER:** Medversant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegation that Plaintiff and each class member used paper and ink or toner in receiving the facsimiles and therefore denies such allegation. Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation in paragraph 24.

25. Plaintiff and each class member is [sic] entitled to statutory damages.

**ANSWER:** Paragraph 25 contains legal conclusions to which no response is required. To the extent paragraph 25 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 25.

26. Defendants violated the TCPA even if their actions were only negligent.

**ANSWER:** Paragraph 26 contains legal conclusions to which no response is required. To the extent paragraph 26 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 26.

27. Defendants should be enjoined from committing similar violations in the future.

**ANSWER:** Paragraph 27 contains legal conclusions to which no response is required. To the extent paragraph 27 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 27.

**CLASS ALLEGATIONS**

28. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons and entities with fax numbers (b) who, on or after a date four years prior to the filing of this action (28 U.S.C. § 1658), (c) were sent faxes by or on behalf of defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., promoting their goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

**ANSWER:** Paragraph 28 contains legal conclusions to which no response is required. To the extent paragraph 28 is intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation in paragraph 28.

29. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

**ANSWER:** Paragraph 29 contains legal conclusions to which no response is required. To the extent paragraph 29 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 29.

30. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:
- 30a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
  - 30b. The manner in which defendant compiled or obtained their list of fax numbers;
  - 30c. Whether defendant thereby violated the TCPA;
  - 30d. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
  - 30e. Whether defendant thereby converted the property of plaintiff.
  - 30f. Whether defendant thereby created a private nuisance.

30g. Whether defendant thereby committed a trespass to chattels.

**ANSWER:** Paragraph 30 and its subparts contain legal conclusions to which no response is required. To the extent paragraph 30 and its subparts are intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation in paragraph 30 and its subparts.

31. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

**ANSWER:** Paragraph 31 contains legal conclusions to which no response is required. To the extent paragraph 31 is intended to include any allegations of fact, Medversant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 31, and therefore denies each and every such allegation in paragraph 31.

32. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

**ANSWER:** Paragraph 32 contains legal conclusions to which no response is required. To the extent paragraph 32 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 32.

33. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

**ANSWER:** Paragraph 33 contains legal conclusions to which no response is required. To the extent paragraph 33 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 33.

34. Several courts have certified class actions under the TCPA. *Holtzman v. Turza*, 08 C 2014, 2009 U.S. Dist. LEXIS 95620 (N.D.Ill., Oct. 14, 2009), *aff'd* in relevant



part, 728 F.3d 682 (7<sup>th</sup> Cir. 2013); *Sadowski v. Medl Online, LLC*, 07 C 2973, 2008 U.S. Dist. LEXIS 41766 (N.D.Ill., May 27, 2008); *CE Design Ltd v Cy's Crabhouse North, Inc.*, 259 F.R.D. 135 (N.D.Ill. 2009); *Targin Sign Sys. v Preferred Chiropractic Ctr., Ltd*, 679 F. Supp. 2d 894 (N.D.Ill. 2010); *Garrett v. Ragle Dental Lab, Inc.*, 10 C 1315, 2010 U.S. Dist. LEXIS 108339, 2010 WL 4074379 (N.D.Ill., Oct. 12, 2010); *Hinman v. M & M Rental Ctr.*, 545 F.Supp. 2d 802 (N.D.Ill. 2008); *Clearbrook v. Rooflifters, LLC*, 08 C 3276, 2010 U.S. Dist. LEXIS 72902 (N.D. Ill. July 20, 2010) (Cox, M.I.); *G.M Sign, Inc. v. Group C Communs., Inc.*, 08 C 4521, 2010 U.S. Dist. LEXIS 17843 (N.D. Ill. Feb. 25, 2010); *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642 (W.D.Wash. 2007); *Display South, Inc. v. Express Computer Supply, Inc.*, 961 So.2d 451, 455 (La. App. 1st Cir. 2007); *Display South, Inc. v. Graphics House Sports Promotions, Inc.*, 992 So. 2d 510 (La. App. 1<sup>st</sup> Cir. 2008); *Lampkin v. GGH, Inc.*, 146 P.3d 847 (Ok. App. 2006); *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. (App.) 94,50 P.3d 844 (2002); *Core Funding Group, LLC v. Young*, 792 N.E.2d 547 (Ind.App. 2003); *Critchfield Physical Therapy v. Taranto Group, Inc.*, 293 Kan. 285; 263 P.3d 767 (2011); *Karen S. Little, L.L.C. v. Drury Inns. Inc.*, 306 S.W.3d 577 (Mo. App. 2010).

**ANSWER:** Paragraph 34 contains legal conclusions to which no response is required. To the extent paragraph 34 is intended to include any allegations of fact, Medversant states that the cases cited speak for themselves. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 34.

35. Management of this class action is likely to present significantly fewer difficulties that those presented in many class actions, e.g. for securities fraud.

**ANSWER:** Paragraph 35 contains legal conclusions to which no response is required. To the extent paragraph 35 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 35.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Actual damages;
- b. Statutory damages;
- c. An injunction against the further transmission of unsolicited fax advertising;
- d. Costs of suit;

- e. Such other or further relief as the Court deems just and proper.

**ANSWER:** All paragraphs beginning with the word “Wherefore” contain legal conclusions to which no response is required. To the extent any paragraphs beginning with the word “Wherefore” are intended to include any allegations of fact, Medversant denies each and every allegation, and specifically denies that Plaintiff or the putative class is entitled to any of the relief sought.

**COUNT II – ILLINOIS CONSUMER FRAUD ACT**

36. Plaintiff incorporates ¶¶ 1-20.

**ANSWER:** Medversant restates and incorporates its answers to Paragraphs 1 through 20 herein.

37. Defendants engaged in unfair acts and practices, in violation of ICFA § 2, 815 ILCS 505/2, by sending unsolicited fax advertising to plaintiff and others.

**ANSWER:** Paragraph 37 contains legal conclusions to which no response is required. To the extent paragraph 37 is intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation in paragraph 37.

38. Unsolicited fax advertising is contrary to the TCPA and also Illinois law. 720 ILCS 5/26-3(b) makes it a petty offense to transmit unsolicited fax advertisements to Illinois residents

**ANSWER:** Paragraph 38 contains legal conclusions to which no response is required. To the extent paragraph 38 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 38.

39. Defendants engaged in an unfair practice by engaging in conduct that is contrary to public policy, unscrupulous, and caused injury to recipients of their advertising.

**ANSWER:** Paragraph 39 contains legal conclusions to which no response is required. To the extent paragraph 39 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 39.

40. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes, in the form of paper and ink or toner consumed as a result.

**ANSWER:** Paragraph 40 contains legal conclusions to which no response is required. To the extent paragraph 40 is intended to include any allegations of fact, Medversant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegation that Plaintiff and each class member used paper and ink or toner in receiving the facsimiles, and therefore denies each and every such allegation. Medversant denies each and every remaining allegation contained in paragraph 40.

41. Defendants engaged in such conduct in the course of trade and commerce.

**ANSWER:** Paragraph 41 contains legal conclusions to which no response is required. To the extent paragraph 41 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 41.

42. Defendant's conduct caused recipients of their advertising to bear the cost thereof. This gave defendant an unfair competitive advantage over businesses that advertise lawfully, such as by direct mail. For example, an advertising campaign targeting one million recipients would cost \$500,000 if sent by U.S. mail but only \$20,000 if done by fax broadcasting. The reason is that instead of spending \$480,000 on printing and mailing his ad, the fax broadcaster misappropriates the recipients' paper and ink. "Receiving a junk fax is like getting junk mail with the postage due". Remarks of Cong. Edward Markey, 135 Cong Rec E 2549, Tuesday, July 18, 1989, 101st Congo 1st Sess.

**ANSWER:** Paragraph 42 contains legal conclusions to which no response is required. To the extent paragraph 42 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 42.

43. Defendant's shifting of advertising costs to plaintiff and the class members in this manner makes such practice unfair. In addition, defendant's conduct was contrary

to public policy, as established by the TCPA and Illinois statutory and common law.

**ANSWER:** Paragraph 43 contains legal conclusions to which no response is required. To the extent paragraph 43 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 43.

44. Defendants should be enjoined from committing similar violations in the future.

**ANSWER:** Paragraph 44 contains legal conclusions to which no response is required. To the extent paragraph 44 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 44, and specifically denies that Plaintiff is entitled to any of the relief sought.

#### **CLASS ALLEGATIONS**

45. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons and entities with Illinois fax numbers (b) who, on or after a date three years prior to the filing of this action, (c) were sent faxes by or on behalf of defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., promoting their goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

**ANSWER:** Paragraph 45 contains legal conclusions to which no response is required. To the extent paragraph 45 is intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 45.

46. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

**ANSWER:** Paragraph 46 contains legal conclusions to which no response is required. To the extent paragraph 46 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 46.

47. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:
- 47a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
  - 47b. Whether defendant thereby violated the TCPA;
  - 47c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
  - 47d. Whether defendant thereby converted the property of plaintiff.
  - 47e. Whether defendant thereby created a private nuisance.
  - 47f. Whether defendant thereby committed a trespass to chattels.

**ANSWER:** Paragraph 47 and its subparts contain legal conclusions to which no response is required. To the extent paragraph 47 and its subparts are intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 47 and its subparts.

48. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

**ANSWER:** Paragraph 48 contains legal conclusions to which no response is required.

To the extent paragraph 48 is intended to include any allegations of fact, Medversant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 48, and therefore denies each and every such allegation in paragraph 48.

49. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

**ANSWER:** Paragraph 49 contains legal conclusions to which no response is required. To the extent paragraph 49 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 49.

50. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

**ANSWER:** Paragraph 50 contains legal conclusions to which no response is required. To the extent paragraph 50 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 50.

51. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

**ANSWER:** Paragraph 51 contains legal conclusions to which no response is required. To the extent paragraph 51 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 51.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unsolicited fax advertising;
- c. Attorney's fees, litigation expenses and costs of suit;
- d. Such other or further relief as the Court deems just and proper.

**ANSWER:** All paragraphs beginning with the word "Wherefore" contain legal conclusions to which no response is required. To the extent any paragraphs beginning with the word "Wherefore" are intended to include any allegations of fact, Medversant denies each and every allegation, and specifically denies that Plaintiff or the putative class is entitled to any of the relief sought.

**COUNT III - CONVERSION**

52. Plaintiff incorporates ¶¶ 1-20.

**ANSWER:** Medversant restates and incorporates its answers to Paragraphs 1 through 20 herein.

53. By sending plaintiff and the class members unsolicited faxes, defendant converted to their own use ink or toner and paper belonging to plaintiff and the class members.

**ANSWER:** Paragraph 53 contains legal conclusions to which no response is required. To the extent paragraph 53 is intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 53.

54. Immediately prior to the sending of the unsolicited faxes, plaintiff and the class members owned and had an unqualified and immediate right to the possession of the paper and ink or toner used to print the faxes.

**ANSWER:** Paragraph 54 contains legal conclusions to which no response is required. To the extent paragraph 54 is intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 54.

55. By sending the unsolicited faxes, defendant appropriated to their own use the paper and ink or toner used to print the faxes and used them in such manner as to make them unusable. Such appropriation was wrongful and without authorization.

**ANSWER:** Paragraph 55 contains legal conclusions to which no response is required. To the extent paragraph 55 is intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of

Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 55.

56. Defendants knew or should have known that such appropriation of the paper and ink or toner was wrongful and without authorization.

**ANSWER:** Paragraph 56 contains legal conclusions to which no response is required. To the extent paragraph 56 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 56.

57. Plaintiff and the class members were deprived of the paper and ink or toner, which could no longer be used for any other purpose. Plaintiff and each class member thereby suffered damages as a result of receipt of the unsolicited faxes.

**ANSWER:** Paragraph 57 contains legal conclusions to which no response is required. To the extent paragraph 57 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 57.

58. Defendants should be enjoined from committing similar violations in the future.

**ANSWER:** Paragraph 58 contains legal conclusions to which no response is required. To the extent paragraph 58 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 58, and specifically denies that Plaintiff is entitled to any of the relief sought.

### **CLASS ALLEGATIONS**

59. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons and entities with Illinois fax numbers (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., promoting their goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

**ANSWER:** Paragraph 59 contains legal conclusions to which no response is required. To the extent paragraph 59 is intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of



Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 59.

60. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

**ANSWER:** Paragraph 60 contains legal conclusions to which no response is required. To the extent paragraph 60 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 60.

61. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:
- 61a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
  - 61b. Whether defendant thereby violated the TCPA;
  - 61c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
  - 61d. Whether defendant thereby converted the property of plaintiff.
  - 61e. Whether defendant thereby created a private nuisance.
  - 61f. Whether defendant thereby committed a trespass to chattels.

**ANSWER:** Paragraph 61 and its subparts contain legal conclusions to which no response is required. To the extent paragraph 61 and its subparts are intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 61 and its subparts.

62. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

**ANSWER:** Paragraph 62 contains legal conclusions to which no response is required. To the extent paragraph 62 is intended to include any allegations of fact, Medversant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 62, and therefore denies each and every such allegation in paragraph 62.

63. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

**ANSWER:** Paragraph 63 contains legal conclusions to which no response is required. To the extent paragraph 63 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 63.

64. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

**ANSWER:** Paragraph 64 contains legal conclusions to which no response is required. To the extent paragraph 64 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 64.

65. Management of this class action is likely to present significantly fewer difficulties that those presented in many class actions, e.g. for securities fraud.

**ANSWER:** Paragraph 65 contains legal conclusions to which no response is required. To the extent paragraph 65 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 65.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unsolicited fax advertising;
- c. Costs of suit;

d. Such other or further relief as the Court deems just and proper.

**ANSWER:** All paragraphs beginning with the word “Wherefore” contain legal conclusions to which no response is required. To the extent any paragraphs beginning with the word “Wherefore” are intended to include any allegations of fact, Medversant denies each and every allegation, and specifically denies that Plaintiff or the putative class is entitled to any of the relief sought.

#### **COUNT IV – PRIVATE NUISANCE**

66. Plaintiff incorporates ¶¶ 1-20.

**ANSWER:** Medversant restates and incorporates its answers to Paragraphs 1 through 20 herein.

67. Defendant's sending plaintiff and the class members unsolicited faxes was an unreasonable invasion of the property of plaintiff and the class members and constitutes a private nuisance.

**ANSWER:** Paragraph 67 contains legal conclusions to which no response is required. To the extent paragraph 67 is intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 67.

68. Congress determined, in enacting the TCPA, that the prohibited conduct was a “nuisance.” *Universal Underwriters Ins. Co. v. Lou Fusz Automotive Network, Inc.*, 401 F.3d 876, 882 (8<sup>th</sup> Cir. 2005).

**ANSWER:** Paragraph 68 contains legal conclusions to which no response is required. To the extent paragraph 68 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 68.

69. Defendants acted either intentionally or negligently in creating the nuisance.

**ANSWER:** Paragraph 69 contains legal conclusions to which no response is required. To the extent paragraph 69 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 69.

70. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes.

**ANSWER:** Paragraph 70 contains legal conclusions to which no response is required. To the extent paragraph 70 is intended to include any allegations of fact, Medversant denies each and every allegation in paragraph 70.

71. Defendants should be enjoined from continuing its nuisance.

**ANSWER:** Paragraph 71 contains legal conclusions to which no response is required. To the extent paragraph 70 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 71, and specifically denies that Plaintiff is entitled to any of the relief sought.

### **CLASS ALLEGATIONS**

72. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of(a) all persons and entities with Illinois fax numbers, (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., promoting their goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

**ANSWER:** Paragraph 72 contains legal conclusions to which no response is required. To the extent paragraph 72 is intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 72.

73. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

**ANSWER:** Paragraph 73 contains legal conclusions to which no response is required. To the extent paragraph 73 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 73.

74. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:
- 74a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
  - 74b. Whether defendant thereby violated the TCPA;
  - 74c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
  - 74d. Whether defendant thereby converted the property of plaintiff.
  - 74e. Whether defendant thereby created a private nuisance.
  - 74f. Whether defendant thereby committed a trespass to chattels.

**ANSWER:** Paragraph 74 and its subparts contain legal conclusions to which no response is required. To the extent paragraph 74 and its subparts are intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 74 and its subparts.

75. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

**ANSWER:** Paragraph 75 contains legal conclusions to which no response is required. To the extent paragraph 75 is intended to include any allegations of fact, Medversant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 75, and therefore denies each and every such allegation in paragraph 75.

76. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories

**ANSWER:** Paragraph 76 contains legal conclusions to which no response is required. To the extent paragraph 76 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 76.

77. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

**ANSWER:** Paragraph 77 contains legal conclusions to which no response is required. To the extent paragraph 77 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 77.

78. Management of this class action is likely to present significantly fewer difficulties that those presented in many class actions, e.g. for securities fraud.

**ANSWER:** Paragraph 78 contains legal conclusions to which no response is required. To the extent paragraph 78 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 78.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unsolicited fax advertising;
- c. Costs of suit;
- d. Such other or further relief as the Court deems just and proper.

**ANSWER:** All paragraphs beginning with the word "Wherefore" contain legal conclusions to which no response is required. To the extent any paragraphs beginning with the word "Wherefore" are intended to include any allegations of fact, Medversant denies each and every

allegation, and specifically denies that Plaintiff or the putative class is entitled to any of the relief sought.

**COUNT V – TRESPASS TO CHATTELS**

79. Plaintiff incorporates ¶¶ 1-20.

**ANSWER:** Medversant restates and incorporates its answers to Paragraphs 1 through 20 herein.

80. Plaintiff and the class members were entitled to possession of the equipment they used to receive faxes

**ANSWER:** Paragraph 80 contains legal conclusions to which no response is required. To the extent paragraph 80 is intended to include any allegations of fact, Medversant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 80 and therefore denies each and every such allegation in paragraph 80.

81. Defendant's sending plaintiff and the class members unsolicited faxes interfered with their use of the receiving equipment and constitutes a trespass to such equipment. *Chair King v. Houston Cellular*, 95cvl066, 1995 WL 1693093 at \*2 (S.D. Tex. Nov. 7, 1995) (denying a motion to dismiss with respect to plaintiffs trespass to chattels claim for unsolicited faxes), vacated on jurisdictional grounds 131 F.3d 507 (5th Cir. 1997).

**ANSWER:** Paragraph 81 contains legal conclusions to which no response is required. To the extent paragraph 81 is intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 81.

82. Defendants acted either intentionally or negligently in engaging in such conduct.

**ANSWER:** Paragraph 82 contains legal conclusions to which no response is required. To the extent paragraph 82 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 82.

83. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes.

**ANSWER:** Paragraph 83 contains legal conclusions to which no response is required. To the extent paragraph 83 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 83.

84. Defendants should be enjoined from continuing trespasses.

**ANSWER:** Paragraph 84 contains legal conclusions to which no response is required. Medversant denies each and every allegation contained in paragraph 84, and specifically denies that Plaintiff is entitled to any of the relief sought.

#### **CLASS ALLEGATIONS**

85. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons and entities with Illinois fax numbers (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendants Medversant Technologies, LLC, and Healthways WholeHealth Networks, Inc., promoting their goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

**ANSWER:** Paragraph 85 contains legal conclusions to which no response is required. To the extent paragraph 85 is intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 85.

86. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

**ANSWER:** Paragraph 86 contains legal conclusions to which no response is required. To the extent paragraph 86 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 86.



87. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:
- 87a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
  - 87b. Whether defendant thereby violated the TCPA;
  - 87c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
  - 87d. Whether defendant thereby converted the property of plaintiff.
  - 87e. Whether defendant thereby created a private nuisance.
  - 87f. Whether defendant thereby committed a trespass to chattels.

**ANSWER:** Paragraph 87 and its subparts contain legal conclusions to which no response is required. To the extent paragraph 87 and its subparts are intended to include any allegations of fact, Medversant admits that it transmitted informational facsimile communications to healthcare providers on behalf of Healthways. Except to the extent admitted, Medversant denies each and every allegation contained in paragraph 87 and its subparts.

88. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

**ANSWER:** Paragraph 88 contains legal conclusions to which no response is required. To the extent paragraph 88 is intended to include any allegations of fact, Medversant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 88, and therefore denies each and every such allegation in paragraph 88.

89. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

**ANSWER:** Paragraph 89 contains legal conclusions to which no response is required. To the extent paragraph 89 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 89.

90. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

**ANSWER:** Paragraph 90 contains legal conclusions to which no response is required. To the extent paragraph 90 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 90.

91. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

**ANSWER:** Paragraph 91 contains legal conclusions to which no response is required. To the extent paragraph 91 is intended to include any allegations of fact, Medversant denies each and every allegation contained in paragraph 91.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unsolicited fax advertising;
- c. Costs of suit;
- d. Such other or further relief as the Court deems just and proper.

**ANSWER:** All paragraphs beginning with the word “Wherefore” contain legal conclusions to which no response is required. To the extent any paragraphs beginning with the word “Wherefore” are intended to include any allegations of fact, Medversant denies each and every allegation, and specifically denies that Plaintiff or the putative class is entitled to any of the relief sought.

### **AFFIRMATIVE AND OTHER DEFENSES**

By way of further answer and defense, Medversant states and asserts the following affirmative and other defenses:

1. The Complaint fails to state a claim upon which relief can be granted.
2. The Complaint is barred by the statute of limitations.
3. The Court lacks subject matter jurisdiction over this class action.
4. The Complaint is barred by Plaintiff's lack of standing.
5. The Complaint is barred by Plaintiff's failure to exhaust administrative remedies before the FCC.
6. Plaintiff's claims should be referred to the Federal Communications Commission pursuant to the doctrine of primary jurisdiction.
7. The Complaint is barred on grounds that Medversant did not have a high degree of involvement in the creation or sending of any facsimile(s) at issue in the Complaint.
8. The Complaint is barred on grounds of an established business relationship with Plaintiff and/or the putative class members.
9. The Complaint is barred on grounds of consent or express permission or invitation. Plaintiff and/or the putative class members gave express permission or invitation to Defendants to send facsimiles at the numbers they provided to Defendants.
10. The Complaint is barred on grounds of good-faith belief of consent or express permission or invitation. Plaintiff and/or the putative class members gave express permission or invitation to Defendants to send facsimiles at the numbers they provided to Defendants.
11. The Complaint is barred on grounds of estoppel. Plaintiff is estopped from bringing this action because Plaintiff and/or the putative class members gave express permission or invitation to Defendants to send facsimiles at the numbers they provided to Defendants..
12. The Complaint is barred on grounds of laches because Plaintiff and/or the putative class members gave express permission or invitation to Defendants to send facsimiles at the numbers they provided to Defendants, and failed to object to other facsimiles that the Defendants transmitted to them.
13. The Complaint is barred on grounds of unclean hands. Plaintiff seeks equitable relief in the form of an injunction and has unclean hands because it gave express permission or invitation to Defendants to send facsimiles at the numbers it provided to Defendants and failed to object to other facsimiles that Defendants transmitted to it.

14. The Complaint is barred on grounds of waiver. Plaintiff and/or the putative class members gave express permission or invitation to Defendants to send facsimiles at the numbers they provided to Defendants, and failed to object to other facsimiles that the Defendants transmitted to them.

15. The Complaint is barred on grounds of knowingly and voluntarily proceeding to encounter a known risk. Plaintiff and/or the putative class members gave express permission or invitation to Defendants to send facsimiles at the numbers they provided to Defendants, and failed to object to other facsimiles that the Defendants transmitted to them.

16. The Complaint is barred on grounds of failure to mitigate alleged damages. Plaintiff and/or the putative class members gave express permission or invitation to Defendants to send facsimiles at the numbers they provided to Defendants, failed to object to other facsimiles that the Defendants transmitted, and never opted out of receiving facsimile communications from Defendants.

17. The Complaint fails to state a valid claim for injunctive relief because Plaintiff cannot establish, among other things, that it does not have an adequate remedy at law.

18. The Court lacks *in personam* jurisdiction over putative out-of-state class members.

19. Plaintiff has not validly stated a class of litigants capable of certification for a class under the Federal Rules of Civil Procedure or under Illinois law.

20. Plaintiff will not fairly and adequately protect the interests of the class because, among other things: the purported class may have received facsimiles different from the ones set forth in Exhibits A and B to the Complaint; Plaintiff gave express permission or invitation to Defendants to send it facsimiles at the number it provided to Defendants; Plaintiff failed to object to other facsimiles that Defendants transmitted; and Plaintiff never opted out of receiving facsimile communications from Defendants.

21. The Complaint is barred on the grounds that Plaintiff does not allege facts sufficient to support class certification.

22. Plaintiff fails to identify any specific “similarly situated individuals” that would be members of a potential class and, thus, fails to make the necessary showing that a class exists.

23. A class action is not the appropriate method for fair and efficient adjudication of the alleged controversy because, among other things: the purported class may have received facsimiles different from the ones set forth in Exhibits A and B to the Complaint; Plaintiff gave express permission or invitation to Defendants to send it facsimiles at the number it provided to Defendants; Plaintiff failed to object to other facsimiles that Defendants sent to it prior to August 13, 2014; and Plaintiff never opted out of receiving facsimile communications from Defendants.

24. The Telephone Consumer Protection Act, codified at 47 U.S.C. § 227 and upon which Plaintiff’s claim relies, violates the First Amendment of the United States Constitution and Article 1, Section 4, of the Illinois Constitution.

25. The Telephone Consumer Protection Act, codified at 47 U.S.C. § 227 and upon which Plaintiff's claim relies, violates the Fifth and Fourteenth Amendments of the United States Constitution under the void-for-vagueness doctrine.

26. The Telephone Consumer Protection Act, codified at 47 U.S.C. § 227 and upon which Plaintiff's claim relies, violates the Excessive Fines Clause of the Eighth Amendment of the United States Constitution.

27. Medversant did not knowingly or willfully violate the Telephone Consumer Protection Act.

28. Plaintiff is not entitled to statutory damages because Medversant has not engaged in any conduct in violation of the JFPA.

29. Medversant did not send any unsolicited advertisements to Plaintiff or the putative class members.

30. Plaintiff is not entitled to attorneys' fees or costs.

31. The amount of damages sought by Plaintiff is unconstitutionally large.

32. Plaintiff's claims are barred, in whole or in part, to the extent that they are uncertain in pleading the material allegations thereof.

33. To the extent that Plaintiff and/or the putative class members sustained any injury, loss, damage or detriment, the injury, loss, damage or detriment was caused by an independent, superseding cause, namely other persons, corporations, or business entities, including but not limited to Healthways, whose acts were unrelated to the alleged acts, omissions, and/or conduct of Medversant.

34. Should Medversant be found liable to Plaintiff, which liability is expressly denied, Medversant is entitled to have the amount of damages abated, reduced or eliminated to the extent the negligence, carelessness, or fault of other persons, corporations, or business entities, including but not limited to Healthways, caused or contributed to Plaintiff's damages, if any.

35. The Complaint, and each purported claim contained therein, is barred because the sole and/or proximate cause of the damages claimed by Plaintiff was and is due to the willful and intentional acts of persons and/or entities other than Medversant, including without limitation Healthways.

36. The facsimile(s) at issue did not adversely affect Plaintiff's privacy rights.

37. Medversant claims the benefit of all other defenses and presumptions set forth in or arising from any rule of law or statute or any other rule of law that is deemed to apply in this action. Medversant reserves the right to assert any additional defenses which may be disclosed during the course of additional investigation and discovery.

WHEREFORE, having fully answered, Medversant respectfully prays for judgment as follows:

1. that the Court deny Plaintiff's request for certification of a class;
2. that judgment be entered in favor of Medversant and against Plaintiff;
3. that Plaintiff takes nothing from Medversant by its suit and that the Complaint be dismissed in its entirety with prejudice; and
4. for such other and further relief as the Court may deem just and proper.

Dated: January 26, 2015

Respectfully submitted,

/s/Erin Bolan Hines

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One of Its Attorneys

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Medversant Technologies, LLC*

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that on January 26, 2015, she caused a true and correct copy of the foregoing **Answer and Affirmative and Other Defenses** to be filed electronically. Notice of this filing will be sent to all parties registered on this Court's ECF system by operation of the Court's electronic filing system. Parties may access this filing through the Court's ECF system.

/s/Erin Bolan Hines

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# **APPENDIX B**



**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

AFFILIATED HEALTH CARE	)	
ASSOCIATES, P.C.,	)	
on behalf of plaintiff and	)	
the class members defined herein,	)	
	)	
Plaintiff,	)	14 C 10247
	)	
v.	)	Judge Kendall
	)	Magistrate Judge Valdez
MEDVERSANT TECHNOLOGIES, LLC,	)	
and HEALTHWAYS WHOLEHEALTH	)	
NETWORKS, INC., and JOHN DOES 1-10,	)	
	)	
Defendants.	)	

**AFFIDAVIT OF IRENE SLUSARENKO**

Irene Slusarenko, on behalf of Affiliated Health Care Associates, P.C., declares under penalty of perjury, as provided for by 28 U.S.C. §1746, that the following statements are true:

1. I have personal knowledge of the facts contained herein.
2. I am the manager of Affiliated Health Care Associates, P.C.
3. Affiliated Health Care Associates, P.C., is the plaintiff in the above-captioned lawsuit.
4. On August 13, 2014, plaintiff, Affiliated Health Care Associates, P.C., received the unsolicited fax advertisement attached as Exhibit A on its facsimile machine from defendants Medversant Technologies, LLC and Healthways Wholehealth Networks, Inc.
5. On August 20, 2014, plaintiff, Affiliated Health Care Associates, P.C., received the unsolicited fax advertisement attached as Exhibit B on its facsimile machine from defendants Medversant Technologies, LLC and Healthways Wholehealth Networks, Inc.

6. Affiliated Health Care Associates, P.C., has never done business with defendant Medversant Technologies, LLC .

7. Affiliated Health Care Associates, P.C., did not consent to receive advertising facsimiles from defendant Medversant Technologies, LLC .

8. Affiliated Health Care Associates, P.C., has never done business with defendant Healthways Wholehealth Networks, Inc.

9. Affiliated Health Care Associates, P.C., did not consent to receive advertising facsimiles from defendant Healthways Wholehealth Networks, Inc.

10. Pursuant to 47 U.S.C. § 227 (b)(3), Affiliated Health Care Associates, P.C., is entitled to receive \$1,500.00 in statutory damages for the unsolicited facsimile advertisements which was sent to it by defendants Medversant Technologies, LLC and Healthways Wholehealth Networks, Inc.

Executed at Chicago, Illinois, on 2-12-, 2015

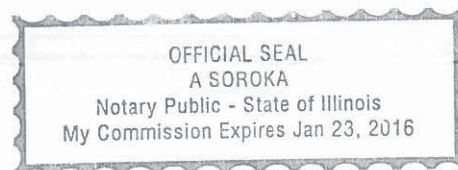
Irene Slusarenko  
Irene Slusarenko, on behalf of  
Affiliated Health Care Associates, P.C.

Subscribed and sworn before me

this 12th day of February, 2015

A. Soroka  
Notary Public

Executed on 02/12, 2015



STATE OF Illinois  
COUNTY OF Cook

SUBSCRIBED AND SWORN TO BEFORE ME  
THIS 12th DAY OF February, 2015  
A. Soroka  
NOTARY PUBLIC

# EXHIBIT A

**PROMAILSOURCE™**  
HIPAA COMPLIANT SECURE EMAIL

August 13, 2014

**RE: Healthways HIPAA Compliance Announcement**

Healthways is excited to announce our partnership with a HIPAA compliant email solution. **ProMailSource™** is an email service, but unlike common email services, it is **secure** (cannot be hacked and protects the privacy of our mutual offices and patients). **ProMailSource™** complies with HIPAA Privacy Rules (now being diligently enforced) that apply to all practitioners who treat patients.

This solution allows you to communicate PHI (Protected Health Information) via email. You will be able to communicate with Healthways, your patients, health plans, attorneys, and anyone you currently share PHI with.

**How will ProMailSource™ benefit you?**

- You can use **ProMailSource™** to communicate securely with all your patients and other healthcare organizations. **Your patients will appreciate your concern for their privacy.**
- Reduce risk of fines for HIPAA violations of up to \$1,500,000.

Healthways will be utilizing **ProMailSource™** to communicate with our practitioners for Educational Materials, Claims Management Questions, Changes to network policies, Practitioner credentialing updates, Practitioner enrollment questions and more.

Healthways will continue to offer all of our existing communication options. We do find a HIPAA compliant email solution to be the most effective method to share and trade information with our practitioners.

**How to subscribe to ProMailSource™**

To subscribe, visit <https://promailsource.com/healthways> or call 1-855-252-4314.

As **ProMailSource™** is a solution that is applicable beyond Healthways there is a cost to subscribe. **ProMailSource™** is only \$12.95 per month or an annual subscription of only \$120 per year per mailbox.

As a valued Healthways partner, **ProMailSource™** has agreed to waive its \$100 implementation fee if you subscribe prior to September 5, 2014.

Sincerely,

A handwritten signature in black ink that reads "Martie Stabelfeldt".

Martie Stabelfeldt

Healthways WholeHealth Networks, Inc.

Vice President, Physical Medicine Operations

## EXHIBIT B



**PROMAILSOURCE™**  
HIPAA COMPLIANT SECURE EMAIL

August 20, 2014

JAROSLAW SLUSARENKO

Location Code: INFOUS41726696276791

**RE: Healthways HIPAA Compliance Announcement**

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Sincerely,

Martie Stabelfeldt, Vice President, Physical Medicine Operations  
Healthways WholeHealth Networks, Inc.